Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, *et ano.*,

Appellants,

v.

PURSUE, LTD.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 73-1119

MTM, INC., *et ano.*,

Appellants,

v.

WILLIAM J. BAXLEY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

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Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

MPAA has consistently opposed all prior restraints of expression.[1] The instant appeals, we believe, involve prior restraint in its most egregious form: complete closure of motion picture theatres and a bookstore, thereby preventing their future exhibition or sale of material of any kind. Any decision by this Court on this question will vitally affect the constitutional interests of all segments of the motion picture industry, as well as other media of expression.

MPAA has requested and has received permission from counsel of record for all of the parties to file this Brief *amicus curiae*.[2]

ARGUMENT

Closing a motion picture theatre because of its past exhibition of obscene films, thereby preventing its future exhibition of films of any kind, is an unconstitutional form of prior restraint.

"This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means

[1] See, e.g., MPAA's Brief of *amicus curiae* in *Grove Press, Inc.* v. *Maryland State Board of Censors*, 401 U.S. 480 (1971) (per curiam).

[2] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

In these cases the states of Ohio and Alabama sought by civil means to assert their interest in preventing the dissemination of obscene material, an interest whose constitutional legitimacy this Court has recently reiterated. *Miller* v. *California*, 413 U.S. 15 (1973), and companion cases.

However, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961). "The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

In No. 73-296, an Ohio court ordered the Cinema I Theatre in Lima, Ohio, closed "for any purpose for a period of one year" because certain films found to be obscene had previously been exhibited at the theatre. The owner of the theatre thereafter sought federal declaratory and injunctive relief. A three-judge federal district court held that the Ohio statutes pursuant to which the state court order had been entered were unconstitutional as applied and enjoined enforcement of the order closing the theatre. *Pursue, Ltd.* v. *Huffman*. — F.Supp. — (N.D. Ohio 1973) (three-judge court).

In No. 73-1119, an Alabama court ordered the Pussycat Adult Theatre and Bookstore in Birmingham, Alabama, closed for an indeterminate period because certain films and printed materials found to be obscene had previously been exhibited at the theatre and sold at the bookstore. The owners of the theatre and bookstore thereafter sought federal declaratory and injunctive relief. A three-judge federal district court held that "the state proceedings here

in question complement, or serve as a substitute for, the criminal laws of the state" and that the complaints should be dismissed on the ground that "plaintiffs have failed to show any of the exceptional circumstances required by *Younger* . . ." *General Corporation* v. *Sweeton*, — F.Supp. — (N.D. Ala. 1973) (three-judge court).[3]

It is MPAA's view that the judgment in No. 73-296 is clearly correct and should be affirmed, and that the judgment in No. 73-1119 is clearly incorrect and should be reversed.

We recognize that the instant appeals present an important issue which this Court has not previously decided: whether the *Younger* line of cases[4] apply when federal relief is sought against a pending state court *civil* proceeding.[5]

Under the *Younger* line of cases, federal injunctive and, ordinarily, declaratory relief is not available against:

> " . . . a pending state court [criminal] prosecution [except] in certain exceptional circumstances—where irreparable injury is 'both great and immediate,' . . . where the state law is ' " 'flagrantly and patently violative of express constitutional prohibitions,' " ' . . . or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.' " *Mitchum* v. *Foster*, 407 U.S. 225, 230 (1972).

[3] The district court's decision involved two cases which had been consolidated. Only one of these cases is here on appeal.

[4] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971) (per curiam); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971) (per curiam).

[5] In a similar factual setting, this same issue was presented in *Speight* v. *Slaton*,—U.S.—(1974) (per curiam), but the Court did not decide it.

However, we do not believe it is necessary for this Court to decide here whether the *Younger* principles apply when a pending state court civil proceeding is involved. For even assuming, *arguendo*, that they do apply, federal intervention was clearly appropriate in the instant cases. Indeed, these cases presented extraordinary circumstances in which federal intervention was "essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum* v. *Foster*, *supra* at 242.[6]

The only constitutionally cognizable interest of the states in the instant cases was their right to prevent the sale or exhibition of obscene material.[7] Yet, rather than an order which "studiously withholds restraint upon matters not already published and not yet found to be offensive," *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445 (1957), the orders entered by the Ohio and Alabama courts prevented *any* future expression, obscene or nonobscene. "Surely, this is to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

As this Court observed in *Carroll* v. *Princess Anne*, 393 U.S. 175, 183-184 (1968):

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle funda-

[6] The plaintiffs in the federal district courts below were under no obligation to resort to the state appellate process and await the outcome of their appeals when (1) their theatres would remain closed during the pendency of those appeals, and (2) even a favorable outcome on appeal could not redress the irreparable injury they would already have suffered. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

[7] These cases do not, for example, involve the violation of valid health, safety or fire laws.

> mental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case."

By contrast, the state court orders in the instant cases were "not reasonably restricted to the evil with which [they are] said to deal," *Butler* v. *Michigan*, *supra* at 383, but rather created "a complete system of censorship." *Near* v. *Minnesota*, 283 U.S. 697, 721 (1931). There is absolutely no difference between these orders and the injunction prohibiting "defendants from showing any and all films obscene or otherwise" which the Supreme Court of Tennessee held invalid in *New Riviera Arts Theatre* v. *State*, 412 S.W.2d 890 (1967). All such orders are the functional equivalent of a statute which is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph. . . ." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941). Under such circumstances, federal intervention was clearly appropriate, even under *Younger* principles.

Moreover, just like a "mass seizure of the tools and equipment required to prepare the newspaper . . . [which thus] disabled appellee from publishing future issues," *Dyson* v. *Stein*, 401 U.S. 200, 204 (1971) (per curiam) (concurring opinion of Brennan, *J.*), the state court orders in the instant cases clearly created irreparable injury. Again, federal intervention was appropriate, even under *Younger* principles.

As the Supreme Court of Georgia recently observed in striking down an order similar to those involved in the instant cases:

> "One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of . . . procedural safeguards and creating an unconstitutional [prior] restraint upon appellant. This broad result cannot be reconciled with free expression under our [state and federal] Constitutions." *Sanders* v. *State*, — Ga. —, 203 S.E.2d 153, 157 (1974).[8]

See also: *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, — La. —, 287 So.2d 480 (1973); *Airways Theater, Inc.* v. *Canale*, — F.Supp. — (W.D. Tenn. 1973) (three-judge court) (per curiam).

The issue in the instant cases is therefore prior restraint in its baldest form.[9] On the basis of past abuses, the orders entered by the Ohio and Alabama courts prevented future exhibition of films of any kind—films unmade as

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[8] On the basis of the same rationale, numerous lower court decisions have held that revocation of theatre or bookstore licenses, or the refusal to grant or renew such licenses, also constitutes an invalid form of prior restraint. See, e.g., *City of Seattle* v. *Bittner*, 81 Wash. 2d 747, 505 P.2d 126 (1973); *Avon 42nd Street Corp.* v. *Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Perrine* v. *Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. denied, 404 U.S. 1038 (1972); *Oregon Bookmark Corporation* v. *Schrunk*, 321 F.Supp. 639 (D.Ore. 1970). In our view, these decisions were clearly correct. Cf. *106 Forsyth Corporation* v. *Bishop*, 362 F.Supp. 1389 (M.D.Ga. 1972), aff'd per curiam, 482 F.2d 280 (5th Cir. 1973), petition for certiorari pending (No. 73-1176).

[9] We recognize that this Court has held that a system of prior restraint is not invalid *per se* in the case of motion pictures. *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961). Nevertheless, such a system is valid only if it contains certain procedural safeguards, which clearly were not observed in the instant cases. *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968) (per curiam); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

well as unseen. The orders provided "no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

Closing a motion picture theatre because of its past exhibition of obscene films, thereby preventing its future exhibition of films of any kind, is clearly an unconstitutional form of prior restraint. It is no different than destroying a printing press because some of the books previously printed on it were obscene.

Certainly, the infringement on First Amendment rights created by the state court orders in the instant cases was much more egregious than restraints which this Court has already held unconstitutional. *Marcus* v. *Search Warrant*, *supra*; *Bantam Books, Inc.* v. *Sullivan*, *supra*; *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968) (per curiam); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973).

What this Court said in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418-419 (1971), is equally applicable here:

> "Under *Near* v. *Minnesota*, . . . the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates . . . to suppress, on the basis of previous publications, distribution of literature 'of any kind' . . . ."

In short, this Court need not decide here whether *Younger* principles apply when federal relief is sought against a pending state court civil proceeding. For even assuming they do apply, federal intervention was clearly appropriate—indeed, necessary—in the instant cases.

CONCLUSION

For the reasons set forth above, the judgment in No. 73-296 should be affirmed and the judgment in No. 73-1119 should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served three copies each of this Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

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